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12 **UNITED STATES DISTRICT COURT**  
13 **EASTERN DISTRICT OF CALIFORNIA**  
14

15 MONA ESTRADA, On Behalf of Herself  
16 and All Others Similarly Situated,

17 Plaintiff,

18 v.

19 JOHNSON & JOHNSON and JOHNSON  
20 & JOHNSON CONSUMER  
COMPANIES, INC.,

21 Defendants.  
22

Case No. 2:14-cv-01051-TLN-KJN

**DEFENDANTS' MOTION TO DISMISS  
AND/OR STRIKE COMPLAINT;  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT THEREOF**

Hearing Date: September 11, 2014  
Time: 2:00 p.m.  
Judge: Hon. Troy L. Nunley  
Courtroom: 2

Complaint Filed: April 28, 2014

**NOTICE OF MOTION AND MOTION TO DISMISS AND/OR TO STRIKE  
TO PLAINTIFF AND HER ATTORNEYS OF RECORD:**

PLEASE TAKE NOTICE THAT on September 11, 2014, at 2:00 p.m. or as soon thereafter as the matter may be heard, in the United States District Court, Eastern District of California, Sacramento Courthouse, located at 501 I Street, Courtroom 2, before the Honorable Troy L. Nunley, Defendants Johnson & Johnson and Johnson & Johnson Consumer Companies, Inc. (collectively, "J&J" or "Defendants") will, and hereby do, move the Court for an order dismissing Plaintiff Mona Estrada ("Estrada")'s Complaint pursuant to Rules 12(b)(1), 12(b)(6), 9(b), and/or 12(f) of the Federal Rules of Civil Procedure.

Specifically, J&J seeks an order (1) dismissing Estrada's entire Complaint because she has not suffered an "injury" for Article III or statutory standing purposes; (2) dismissing Estrada's UCL, CLRA, and negligent misrepresentation claims because she fails to meet the heightened pleading standard of Rule 9(b); (3) dismissing Estrada's negligent misrepresentation claim because she fails to identify any actionable misstatements; (4) dismissing Estrada's implied warranty claim for failure to state a claim and for lack of privity; (5) dismissing and/or striking Estrada's allegations regarding representations on which she did not rely; (6) dismissing and/or striking Estrada's prayer for injunctive relief for lack of standing; and (7) dismissing and/or striking Estrada's class action allegations.

This Motion is based on the Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, any other related documents filed in connection with this Motion, the papers and records on file in this action, and such other written and oral argument as may be presented to the Court.

Dated: June 20, 2014

RICHARD B. GOETZ  
MATTHEW D. POWERS  
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O'MELVENY & MYERS LLP

By: /s/ Matthew D. Powers

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**TABLE OF CONTENTS**

	<b>Page</b>
I. INTRODUCTION .....	1
II. BACKGROUND FACTS .....	4
III. LEGAL STANDARDS.....	5
IV. PLAINTIFF SUFFERED NO INJURY.....	7
V. PLAINTIFF’S CLASS DEFINITION SHOULD BE STRICKEN .....	9
VI. PLAINTIFF’S FRAUD CLAIMS SHOULD BE DISMISSED UNDER RULE 9(B) .....	11
VII. PLAINTIFF’S NEGLIGENT MISREPRESENTATION AND IMPLIED WARRANTY CLAIMS FAIL AS A MATTER OF LAW .....	14
A. Negligent Misrepresentation Requires a “Positive Assertion” .....	14
B. Breach of Implied Warranty.....	14
1. Johnson’s Baby Powder Is Not “Unmerchantable” .....	14
2. Plaintiff Lacks Privity .....	15
VIII. PLAINTIFF LACKS STANDING TO SEEK INJUNCTIVE RELIEF .....	16
IX. CONCLUSION .....	17

## TABLE OF AUTHORITIES

## Page

**CASES**

<i>Am. Suzuki Motor Corp. v. Superior Court</i> , 37 Cal. App. 4th 1291 (1995) .....	10, 15
<i>Apollo Capital Fund LLC v. Roth Capital Partners, LLC</i> , 158 Cal. App. 4th 226 (2007) .....	14
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009) .....	2, 6
<i>Balistreri v. Pacifica Police Dep't</i> , 901 F.2d 696 (9th Cir. 1988) .....	5
<i>Baltazar v. Apple, Inc.</i> , No. CV-10-3231-JF, 2011 WL 588209 (N.D. Cal. Feb. 10, 2011) .....	13
<i>Bell Atl. Corp. v. Twombly</i> , 550 U.S. 544 (2007) .....	2, 6
<i>Birdsong v. Apple, Inc.</i> , 590 F.3d 955 (9th Cir. 2009) .....	passim
<i>Bishop v. Saab Auto. A.B.</i> , No. 95-cv-0721 JGD (JRX), 1996 WL 33150020 (C.D. Cal. Feb. 16, 1996) .....	10
<i>Boysen v. Walgreen Co.</i> , No. C 11-06262 SI, 2012 U.S. Dist. LEXIS 100528 (N.D. Cal. July 19, 2012) .....	2, 8, 9
<i>Buckland v. Threshold Enters., Ltd.</i> , 155 Cal. App. 4th 798 (2007) .....	7
<i>Campion v. Old Republic Home Prot. Co.</i> , 861 F. Supp. 2d 1139 (S.D. Cal. 2012) .....	16
<i>Cent. Delta Water Agency v. United States</i> , 306 F.3d 938 (9th Cir. 2002) .....	6
<i>Cetacean Cmty. v. Bush</i> , 386 F.3d 1169 (9th Cir. 2004) .....	6
<i>Clemens v. DaimlerChrysler Corp.</i> , 534 F.3d 1017 (9th Cir. 2008) .....	4, 15
<i>Cohen v. DirecTV, Inc.</i> , 178 Cal. App. 4th 966 (2010) .....	13
<i>Crouch v. Johnson &amp; Johnson Consumer Cos.</i> , No. 09-cv-2905 (DMC), 2010 WL 1530152 (D.N.J. Apr. 15, 2010) .....	9
<i>Daugherty v. Am. Honda Motor Co.</i> , 144 Cal. App. 4th 824 (2006) .....	13

**TABLE OF AUTHORITIES**  
(continued)

	Page
<i>Deitz v. Comcast Corp.</i> , No. 06-cv-06532 WHA, 2006 WL 3782902 (N.D. Cal. Dec. 21, 2006) .....	16
<i>Fair v. U.S. EPA</i> , 795 F.2d 851 (9th Cir. 1986).....	6
<i>Fantasy, Inc. v. Fogerty</i> , 984 F.2d 1524 (9th Cir. 1993), <i>rev'd on other grounds</i> , 510 U.S. 517 (1994).....	7
<i>Gest v. Bradbury</i> , 443 F.3d 1177 (9th Cir. 2006).....	16
<i>Herrington v. Johnson &amp; Johnson Consumer Cos.</i> , No. C 09–1597 CW, 2010 WL 3448531 (N.D. Cal. Sept. 1, 2010) .....	2, 8, 9
<i>Hicks v. Kaufman &amp; Broad Home Corp.</i> , 89 Cal. App. 4th 908 (2001) .....	8
<i>Hodes v. Van's Int'l Foods</i> , No. CV 09-01530 RGK (FFMx), 2009 U.S. Dist. LEXIS 72193 (C.D. Cal. July 23, 2009).....	11
<i>Hoey v. Sony Elec., Inc.</i> , 515 F. Supp. 2d 1099 (N.D. Cal. 2007) .....	13
<i>In re Actimmune Mktg. Litig.</i> , 614 F. Supp. 2d 1037 (N.D. Cal. 2009) .....	12
<i>In re Google, Inc. Privacy Policy Litig.</i> , No. C-12-01382-PBG, 2013 WL 6248499 (N.D. Cal. Dec. 3, 2013).....	7
<i>In re Hulu Privacy Litig.</i> , No. 11-CV-3764, [Dkt. No. 211] (N.D. Cal. June 17, 2014).....	11
<i>In re Phenylpropanolamine (PPA) Prods. Liab. Litig.</i> , 214 F.R.D. 614 (W.D. Wash. 2003) .....	11
<i>Johns v. Bayer Corp.</i> , No. 09CV1935 DMS (JMA), 2010 WL 476688 (S.D. Cal. Feb. 9, 2010) .....	3, 13
<i>Kearns v. Ford Motor Co.</i> , 567 F.3d 1120 (9th Cir. 2009).....	6, 7, 12, 13
<i>Kwikset Corp. v. Superior Court</i> , 51 Cal. 4th 310 (2011) .....	7, 12, 13
<i>Lanovaz v. Twinings N. Am., Inc.</i> , No. C–12–02646–RMW, 2013 WL 675929 (N.D. Cal. Feb. 25, 2013).....	13
<i>Lierboe v. State Farm Mut. Auto. Ins. Co.</i> , 350 F.3d 1018 (9th Cir. 2003).....	7
<i>Long v. Graco Children's Prods. Inc.</i> , No. 13–cv–01257–WHO, 2013 WL 4655763 (N.D. Cal. Aug. 26, 2013) .....	15

**TABLE OF AUTHORITIES**  
(continued)

	Page
<i>Lopez v. Nissan N. Am., Inc.</i> , 201 Cal. App. 4th 572 (2011) .....	4, 14
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992) .....	7
<i>Lyons v. Bank of Am., NA</i> , No. C 11–1232 CW, 2011 WL 6303390 (N.D. Cal. Dec. 16, 2011) .....	10
<i>Maxwell v. Unilever U.S., Inc.</i> , No. 12-CV-1736, 2013 WL 1435232 (N.D. Cal. Apr. 9, 2013) .....	13
<i>McCrary v. Elations Co.</i> , No. EDCV 13–0242 JGB (OPx), 2013 WL 6403073 (C.D. Cal. July 12, 2013) .....	3, 13
<i>McGlinchy v. Shell Chem. Co.</i> , 845 F.2d 802 (9th Cir. 1988) .....	6
<i>Mocek v. Alfa Leisure, Inc.</i> , 114 Cal. App. 4th 402 (2003) .....	4, 14
<i>Myers-Armstrong v. Actavis Totowa</i> , No. C 08–04741 WHA, 2009 WL 1082026 (N.D. Cal. Apr. 22, 2009) .....	8, 9
<i>Neilson v. Union Bank of Cal., N.A.</i> , 290 F. Supp. 2d 1101 (C.D. Cal. 2003) .....	6, 12
<i>Pence v. Andrus</i> , 586 F.2d 733 (9th Cir. 1978) .....	7
<i>Princess Cruise Lines, Ltd. v. Superior Court</i> , 179 Cal. App. 4th 36 (2009) .....	12
<i>Red v. Kraft Foods, Inc.</i> , CV 10-1028-GW(AGRx), 2012 U.S. Dist. LEXIS 186948 (C.D. Cal. Apr. 12, 2012) .....	11
<i>Rivera v. Wyeth-Ayerst Labs.</i> , 283 F.3d 315 (5th Cir. 2002) .....	2, 8, 9
<i>Rule v. Fort Dodge Animal Health, Inc.</i> , 607 F.3d 250 (1st Cir. 2010) .....	15
<i>Sanders v. Apple Inc.</i> , 672 F. Supp. 2d 978 (N.D. Cal. 2009) .....	3, 9
<i>Sevidal v. Target Corp.</i> , 189 Cal. App. 4th 905 (2010) .....	13
<i>Shamsian v. Atl. Richfield Co.</i> , 107 Cal. App. 4th 967 (2003) .....	14

**TABLE OF AUTHORITIES**  
(continued)

	<b>Page</b>
<i>Soares v. Lorono</i> , No. 12-cv-05979-WHO, 2014 U.S. Dist. LEXIS 24674 (N.D. Cal. Feb. 25, 2014) .....	15
<i>Stephenson v. Neutrogena Corp.</i> , No. C 12-0426-PJH, 2012 WL 8527784 (N.D. Cal. July 27, 2012) .....	16
<i>Tietsworth v. Sears, Roebuck &amp; Co.</i> , 720 F. Supp. 2d 1123 (N.D. Cal. 2010) .....	10
<i>Vess v. Ciba-Geigy Corp. USA</i> , 317 F.3d 1097 (9th Cir. 2003).....	3, 6, 12, 13
<i>Walsh v. Nev. Dep’t of Human Res.</i> , 471 F.3d 1033 (9th Cir. 2006).....	16
<i>Wang v. OCZ Tech. Grp., Inc.</i> , 276 F.R.D. 618 (N.D. Cal. 2011) .....	16
<i>Xavier v. Philip Morris USA Inc.</i> , 787 F. Supp. 2d 1075 (N.D. Cal. 2011) .....	11, 15

**STATUTES**

Cal. Bus. & Prof. Code § 17200 <i>et seq.</i> .....	5
Cal. Bus. & Prof. Code § 17204 .....	7, 12
Cal. Bus. & Prof. Code § 17208 .....	10
Cal. Bus. & Prof. Code § 17535 .....	7
Cal. Civ. Code § 1750 <i>et seq.</i> .....	5
Cal. Civ. Code § 1780 .....	12
Cal. Civ. Code § 1780(a) .....	7
Cal. Civ. Code § 1783 .....	10
Cal. Health & Safety Code § 25249.8(b) .....	1

**RULES**

Fed. R. Civ. P. 12(b)(1).....	6, 7
Fed. R. Civ. P. 12(b)(6).....	5
Fed. R. Civ. P. 12(f) .....	7
Fed. R. Civ. P. 9(b) .....	6, 12, 13

1 **I. INTRODUCTION**

2 This is a classic “no injury” case. Plaintiff Mona Estrada (“Estrada”) contends that  
 3 everyone who purchased Johnson’s Baby Powder should get their money back because of an  
 4 alleged health risk that had no impact on the vast majority of class members, including Estrada  
 5 herself. Estrada argues that a subset of the product’s purchasers—women who regularly used  
 6 Johnson’s Baby Powder in their genital area for years—were allegedly exposed to a risk of  
 7 ovarian cancer from the talc in that product. If this case proceeds, Defendants Johnson &  
 8 Johnson and Johnson & Johnson Consumer Companies, Inc. (collectively, “J&J”)<sup>1</sup> will prove that  
 9 Estrada’s assertions about those “risks” are completely meritless.<sup>2</sup> But that is of no moment here  
 10 because the facts Estrada alleges show that *she* was never harmed.

11 Estrada’s theory of economic injury is that she would not have bought the product if she  
 12 had known about its alleged risks. But she has already received all of the benefits she expected  
 13 when she purchased the product—she bought and consumed it again and again for decades. And  
 14 she admits that she never suffered any ill effects whatsoever. (Compl. ¶ 9 (“Plaintiff is not  
 15

---

16 <sup>1</sup> To be clear, although Defendants Johnson & Johnson and Johnson & Johnson Consumer  
 17 Companies, Inc. are collectively referred to as “J&J” herein, Johnson & Johnson Consumer  
 18 Companies, Inc. manufactured and marketed Johnson’s Baby Powder; Johnson & Johnson did not  
 manufacture or market Johnson’s Baby Powder.

19 <sup>2</sup> For purposes of this Motion, the Court must accept as true Estrada’s allegation that extended use  
 20 of talc by adult women in their genital area is associated with a 33% increased risk of ovarian  
 21 cancer. (Compl. ¶ 57.) But none of the studies Estrada cites actually establish a causal  
 22 relationship between female genital talc use and ovarian cancer, and many of those studies are  
 23 seriously flawed. For example: none of the studies were conducted on the actual products at  
 24 issue; Cramer (1982) and Chen (1992) (*id.* ¶¶ 24, 31) did not account for confounding factors  
 25 such as age and obesity; and Egi (1961), Cralley (1968), Henderson (1971), Rohl (1976), Cramer  
 26 (1982), Hartge (1983), Whittemore (1988), Harlow (1989), Cook (1997), Gertig (2000), and Mills  
 27 (2004) (*id.* ¶¶ 21-24, 26-27, 29, 36, 41-42) included exposures to products with asbestiform talc  
 28 (J&J’s products have been free of asbestiform talc for decades). The U.S. Food and Drug  
 Administration (“FDA”) has not restricted the use of non-asbestiform talc in cosmetics. *See*  
<http://www.fda.gov/cosmetics/productsingredients/ingredients/ucm293184.htm>. Non-  
 asbestiform talc (the type of talc used in Johnson & Johnson’s products) is also **not** listed as a  
 cancer-causing agent by the American Cancer Society or by California’s Office of Environmental  
 Health Hazard Assessment under California’s Proposition 65, the Safe Drinking Water and Toxic  
 Enforcement Act of 1986. *See* Cal. Health & Safety Code § 25249.8(b),  
[www.cancer.org/cancer/cancercauses/othercarcinogens/generalinformationaboutcarcinogens/known-and-probable-human-carcinogens](http://www.cancer.org/cancer/cancercauses/othercarcinogens/generalinformationaboutcarcinogens/known-and-probable-human-carcinogens). In addition, the Centers for Disease Control and  
 Prevention (“CDC”) does not list talc use in their risk factors for ovarian cancer. *See*  
[http://www.cdc.gov/cancer/ovarian/basic\\_info/risk\\_factors.htm](http://www.cdc.gov/cancer/ovarian/basic_info/risk_factors.htm).

1 claiming physical harm or seeking the recovery of personal injury damages.”.) In other words,  
 2 Estrada got what she paid for and never experienced any of the problems she alleges *others* may  
 3 have developed. Under these circumstances, Estrada suffered no cognizable injury and lacks  
 4 standing to bring any claims against J&J. *See Herrington v. Johnson & Johnson Consumer Cos.*,  
 5 No. C 09–1597 CW, 2010 WL 3448531, at \*5 (N.D. Cal. Sept. 1, 2010) (rejecting “no injury”  
 6 economic claims for failure to warn of alleged carcinogens in Johnson’s Baby Shampoo ); *Boysen*  
 7 *v. Walgreen Co.*, No. C 11-06262 SI, 2012 U.S. Dist. LEXIS 100528 (N.D. Cal. July 19, 2012)  
 8 (rejecting “no injury” economic claims for failure to warn of alleged lead and arsenic in fruit  
 9 juices). *See also Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315, 319-20 (5th Cir. 2002) (rejecting  
 10 “no injury” economic claims for failure to warn of risks of medication because “[b]y plaintiff’s  
 11 own admission, [she] paid for an effective [product], and she received just that—the benefit of her  
 12 bargain.”).

13 In fact, Estrada’s claim that “all” purchasers suffered an economic injury is implausible on  
 14 its face.<sup>3</sup> Estrada argues that “[a]ll persons who purchased Johnson’s Baby Powder” should get  
 15 their money back because, she contends, women who apply the product directly to their genital  
 16 area have an allegedly increased risk. But talcum powder has dozens of beneficial uses that have  
 17 nothing to do with that specific use,<sup>4</sup> and Estrada never explains why the elimination of that one  
 18 particular use would render the product worthless. At a minimum, Estrada’s proposed class  
 19 allegations should be stricken because her putative class of “all” purchasers includes many  
 20 individuals who were never even exposed to the alleged risk in the first place: (1) men (who  
 21 obviously do not have ovaries), and (2) the many women who bought Johnson’s Baby Powder for

22  
 23 <sup>3</sup> *See, e.g., Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (“[d]etermining whether a complaint states  
 24 a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to  
 draw on its judicial experience and common sense.”); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,  
 570 (2007) (plaintiff’s claims must move “across the line from conceivable to plausible.”).

25 <sup>4</sup> For example, talcum powder is commonly used in shoes and on the feet to eliminate moisture  
 26 and odors, under the arms in addition to or instead of deodorant, on the hands of athletes to  
 prevent slipperiness, on clothing or carpets to absorb grease, on pets as dry shampoo, on sheets to  
 27 make sleeping more comfortable, on the skin after shaving, on floor boards to silence squeaks, on  
 skin to help remove sticky sand, on sticky rubber products (such as dish gloves) to store and  
 separate, in litter boxes for freshness, etc. *See, e.g., Brilliant Uses for Baby Powder*, Reader’s  
 28 Digest, [www.rd.com/home/brilliant-uses-for-baby-powder](http://www.rd.com/home/brilliant-uses-for-baby-powder) (retrieved on June 11, 2014).

1 uses other than in their genital area. *See, e.g., Sanders v. Apple Inc.*, 672 F. Supp. 2d 978, 990-91  
 2 (N.D. Cal. 2009) (striking class allegations where the class “contain[ed] members lacking Article  
 3 III standing . . . . The class must therefore be defined in such a way that anyone within it would  
 4 have standing.”).

5 Estrada has also not alleged any valid “misrepresentation” claim because she did not  
 6 personally rely on any “false” statement by J&J. To be sure, she does allege that she read the  
 7 label. (Compl. ¶ 9 (“Prior to making her purchase, Plaintiff read the label for the Baby Powder  
 8 . . . described herein and above[.]”). But Estrada does not contend that any statements on the  
 9 label are false. (*See id.* ¶ 15 (“silky soft skin,” “designed to gently absorb excess moisture  
 10 helping skin feel comfortable,” “glides over skin to leave it delicately soft and dry,” “clinically  
 11 proven mildness,” and “providing soothing relief”). Instead, her misrepresentation claims seem  
 12 to be based on statements on J&J’s website. (*Id.* ¶¶ 16-17.) Yet Estrada never actually saw (let  
 13 alone relied on) those statements before she bought the product. (*See id.* ¶ 9.) Thus, to the extent  
 14 Estrada’s claims are based on alleged affirmative misrepresentations she never saw, they must be  
 15 dismissed (or stricken). *See McCrary v. Elations Co.*, No. EDCV 13–0242 JGB (OPx), 2013 WL  
 16 6403073, at \*7-8 (C.D. Cal. July 12, 2013) (dismissing claims based on statements on  
 17 defendant’s website because plaintiff only relied on product package); *Johns v. Bayer Corp.*, No.  
 18 09CV1935 DMS (JMA), 2010 WL 476688, at \*5 (S.D. Cal. Feb. 9, 2010) (plaintiff “cannot  
 19 expand the scope of his claims to include . . . advertisements relating to a product that he did not  
 20 rely upon.”).

21 Finally, Estrada’s Complaint suffers from a number of additional flaws. First, although  
 22 Estrada’s UCL, CLRA, and negligent misrepresentation claims are all based in fraud, Estrada  
 23 never explains which of the many statements described in the Complaint she actually read or  
 24 relied on—other than her statement that she read “the label” which, again, does not contain any  
 25 statement that Estrada contends is false. *See Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106  
 26 (9th Cir. 2003) (plaintiff required to plead “the who, what, when, where, and how” of alleged  
 27 fraudulent representation or omission). Second, Estrada’s negligent misrepresentation claim fails  
 28 because that claim requires an *affirmative* misrepresentation (omissions are not enough) and

1 Estrada does not (and cannot) point to any actionable affirmative statement that she personally  
 2 relied on. *Lopez v. Nissan N. Am., Inc.*, 201 Cal. App. 4th 572, 596 (2011) (negligent  
 3 misrepresentation “requires a positive assertion, not merely an omission”). Third, Estrada’s  
 4 implied warranty claim fails because Estrada lacks privity with J&J, *see Clemens v.*  
 5 *DaimlerChrysler Corp.*, 534 F.3d 1017, 1023 (9th Cir. 2008), and does not allege any facts to  
 6 show Johnson’s Baby Powder was “unmerchantable” when sold—*i.e.*, that it failed to “possess  
 7 even the most basic degree of fitness for ordinary use.” *Mocek v. Alfa Leisure, Inc.*, 114 Cal.  
 8 App. 4th 402, 406 (2003). Nor can Estrada allege such facts: talcum powder obviously has many  
 9 beneficial uses that have nothing to do with the risks alleged in this case (*e.g.*, use by men and use  
 10 by women on the skin, in shoes, under the arms, etc.).

11 At the end of the day, Estrada received exactly what she bargained for—and she cannot  
 12 use her contention that others were injured to manufacture an economic loss claim. Her  
 13 Complaint should be dismissed with prejudice.

## 14 **II. BACKGROUND FACTS**

15 According to her Complaint, Estrada has been buying Johnson’s Baby Powder for  
 16 personal use in her genital area since approximately 1950. (Compl. ¶ 9.) Estrada has not  
 17 developed ovarian cancer, and does not contend that her use of the product has put her at an  
 18 increased risk of developing ovarian cancer in the future. (*Id.*) Instead, she contends that she  
 19 should get her money back because she would not have purchased Johnson’s Baby Powder if she  
 20 had known that (according to Estrada) women who use talc on their genitals “have a 33%  
 21 increased risk of ovarian cancer.” (*Id.* ¶ 3.)

22 Estrada does not (and cannot) claim that talc is banned by the FDA for use in cosmetics or  
 23 that Johnson’s Baby Powder is misbranded, adulterated, or otherwise fails to comply with any  
 24 applicable regulations regarding its ingredients or labeling. Instead, Estrada bases her assertions  
 25 about the alleged health risks of the product on reports that conclude, for example, that there is  
 26 “limited evidence” genital talc use is a “possible” carcinogen but that do not establish a causal  
 27 relationship because “chance, bias or confounding could not be ruled out with reasonable  
 28 confidence.” (*Id.* ¶ 60 (quoting a 2006 World Health Organization paper summarizing global

1 scientific studies on genital talc use).)

2 In her Complaint, Estrada contends that Johnson’s Baby Powder is “advertised for use by  
3 women,” that J&J “encouraged” “use of the product in the genital area,” and that J&J “intended  
4 for women to use the Baby Powder in the very manner most likely to result in an increased risk of  
5 ovarian cancer.” (*Id.* ¶¶ 4, 13, 70-71.) But Estrada never identifies any such statements by J&J,  
6 and does not contend that she actually relied on any such statements (whatever they were) when  
7 she bought the product. (*See id.* ¶ 9 (claiming only that “[p]rior to making her purchase, Plaintiff  
8 read the label for the Baby Powder”).) Instead, Estrada asserts that statements on the  
9 www.johnsonsbaby.com and www.safetyandcarecommitment.com websites are misleading  
10 because (according to Estrada) the products are not “safe.” (*Id.* ¶¶ 16-17 (“Use [Johnson’s Baby  
11 Powder] anytime you want skin to feel soft, fresh, and comfortable”; the product is “clinically  
12 proven to be safe, gentle, and mild”).) But again, Estrada does not contend she ever even saw  
13 those statements before filing this lawsuit.

14 Estrada was satisfied with Johnson’s Baby Powder—she used it for decades—and never  
15 explains what other products she would or could have used in place of Johnson’s Baby Powder to  
16 obtain the same benefits at a lower price (or without the alleged risk). Nevertheless, Estrada  
17 contends that she has been economically injured because she would not have purchased the  
18 product had she “known the truth about” its safety. (*Id.* ¶ 9.) Based on those allegations, Estrada  
19 asserts claims under California’s Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code  
20 § 17200 *et seq.*, and the Consumers Legal Remedies Act (“CLRA”), Cal. Civ. Code § 1750 *et*  
21 *seq.*, as well as claims for negligent misrepresentation and breach of implied warranty. Estrada  
22 seeks to certify a nationwide class of “[a]ll persons” who bought “Johnson’s Baby Powder in  
23 California and in states with laws that do not conflict with the laws asserted here.” (Compl. ¶ 74.)

### 24 **III. LEGAL STANDARDS**

25 Motions to dismiss should be granted where, as here, the plaintiff has failed to state any  
26 valid claim for relief. Dismissal under Rule 12(b)(6) is appropriate where there is either a “lack  
27 of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal  
28 theory.” *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1988). Accordingly,

1 Estrada’s Complaint should be dismissed if it does not “contain sufficient factual matter, accepted  
 2 as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662,  
 3 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). And while the Court  
 4 must accept all well-pled *facts* as true, the Court need not assume the truth of legal conclusions  
 5 merely because they are pled in the form of factual allegations. *Iqbal*, 556 U.S. at 677-79.  
 6 “[C]onclusory allegations without more are insufficient to defeat a motion to dismiss for failure to  
 7 state a claim.” *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988).

8 Next, if Plaintiff lacks standing, the action “should be dismissed” under Rule 12(b)(1).  
 9 *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1174 (9th Cir. 2004). “A suit brought by a plaintiff  
 10 without Article III standing is not a “case or controversy,” and “an Article III federal court  
 11 therefore lacks subject matter jurisdiction over the suit.” *Id.* The burden of establishing standing  
 12 elements “falls upon the party asserting federal jurisdiction.” *Cent. Delta Water Agency v. United*  
 13 *States*, 306 F.3d 938, 947 (9th Cir. 2002). The standing elements are “not mere pleading  
 14 requirements” but are an “indispensable part of the plaintiff’s case” and “must be supported at  
 15 each stage of litigation in the same manner as any other essential element of the case.” *Id.* “At an  
 16 irreducible minimum, Article III requires that the plaintiff show that he has personally suffered  
 17 some actual or threatened injury as a result of defendant’s illegal conduct . . . and that the injury  
 18 ‘fairly can be traced to the challenged action’ and ‘is likely to be redressed by a favorable  
 19 decision.’” *Fair v. U.S. EPA*, 795 F.2d 851, 853 (9th Cir. 1986) (citation omitted).

20 In addition, Estrada’s fraud-based CLRA, UCL, and negligent misrepresentation claims  
 21 must meet the heightened pleading standard of Rule 9(b), which requires Estrada to “state with  
 22 particularity the circumstances constituting fraud or mistake.” Fed. R. Civ. P. 9(b); *see also*  
 23 *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1126-27 (9th Cir. 2009) (applying Rule 9(b) standard  
 24 to allegations of fraud by omission under the UCL and CLRA); *Neilson v. Union Bank of Cal.*,  
 25 *N.A.*, 290 F. Supp. 2d 1101, 1141 (C.D. Cal. 2003) (negligent misrepresentation claims must  
 26 satisfy Rule 9(b)). Under Rule 9(b), Estrada must plead the time, place, and content of the  
 27 alleged false representation or omission—“the who, what, when, where, and how”—as well as  
 28 facts demonstrating her reliance on the allegedly fraudulent conduct. *Vess*, 317 F.3d at 1106

(citation omitted); *see also Kearns*, 567 F.3d at 1124.

Finally, under Rule 12(f), the Court “may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.” Fed. R. Civ. P. 12(f). “The function of a 12(f) motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial . . . .” *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993) (quotation marks, citation, and first alteration omitted), *rev’d on other grounds*, 510 U.S. 517 (1994).

#### IV. PLAINTIFF SUFFERED NO INJURY

Estrada’s entire Complaint should be dismissed under Rule 12(b)(1) because she has not suffered any cognizable Article III “injury”:<sup>5</sup>

To satisfy Article III, a plaintiff “must show that (1) it has suffered an ‘injury in fact’ that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.”

*In re Google, Inc. Privacy Policy Litig.*, No. C-12-01382-PBG, 2013 WL 6248499, at \*3 (N.D. Cal. Dec. 3, 2013); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). And in class actions, “the named representatives must allege and show that they personally have been injured” in order to sustain a cause of action. *Lierboe v. State Farm Mut. Auto. Ins. Co.*, 350 F.3d 1018, 1022 (9th Cir. 2003) (quoting *Pence v. Andrus*, 586 F.2d 733, 736-37 (9th Cir. 1978)).

Here, Estrada expressly alleges that she never suffered any ill effects from using Johnson’s Baby Powder—she has no personal injury claim and does not assert any kind of “medical monitoring” claim (*i.e.*, she does **not** allege that she still suffers from an increased risk

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<sup>5</sup> In addition to Article III standing, a plaintiff must establish statutory standing to bring claims under the UCL or CLRA. *See* Cal. Bus. & Prof. Code §§ 17204, 17535; Cal. Civ. Code § 1780(a). These statutes require the plaintiff to show that he or she has suffered an “economic injury.” *See Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 323 (2011). The economic injury requirement is “narrower than federal standing . . . which may be predicated on a broader range of injuries.” *Id.* at 324. Thus, after the UCL was amended by Proposition 64, statutory standing under the UCL is somewhat narrower than Article III standing. *Buckland v. Threshold Enters., Ltd.*, 155 Cal. App. 4th 798, 814 (2007) (quoting Prop. 64, § 1, subd. (e)). In this case, Estrada lacks statutory standing for substantially the same reasons she lacks Article III standing. *See Birdsong v. Apple, Inc.*, 590 F.3d 955, 959-61 & n.4 (9th Cir. 2009) (explaining that “insofar as the UCL incorporates Article III’s injury in fact requirement, the plaintiffs would lack an Article III injury in fact for the same reasons”).

1 even though she no longer uses talc in her genital area). Instead, she argues that she is entitled to  
 2 a refund because other talc users (but not her) may have experienced problems. But “[m]erely  
 3 asking for money does not establish an injury in fact,” and, as the Fifth Circuit explained more  
 4 than a decade ago, a plaintiff suffers no injury where, “[b]y plaintiff’s own admission, [she] paid  
 5 for an effective [product], and she received just that—the benefit of her bargain.” *Rivera*, 283  
 6 F.3d at 319-20. Here, Estrada has no economic injury because her own allegations demonstrate  
 7 that she received all the benefits she expected when she bought and consumed the product—in  
 8 fact, she continued to buy it for decades—and never suffered from any of the ill effects that she  
 9 contends may have impacted other consumers.

10 The fact that a product might pose a risk to *others* does not grant uninjured purchasers the  
 11 right to sue. Accordingly, courts have rejected similar attempts to transform “no injury” claims  
 12 into consumer protection cases. *See Herrington*, 2010 WL 3448531, at \*5; *Birdsong v. Apple,*  
 13 *Inc.*, 590 F.3d 955, 959-61 & n.4 (9th Cir. 2009). In *Herrington*, for example, Judge Claudia  
 14 Wilken in the Northern District of California rejected economic injury claims brought by a  
 15 plaintiff who argued that J&J had “failed” to disclose “probable carcinogens” in Johnson’s Baby  
 16 Shampoo. There, as here, the “consumer good” had been completely “used to the[ ] [plaintiff’s]  
 17 benefit,” the named plaintiff suffered no physical injury from exposure to the alleged  
 18 “carcinogens” in the product, and was not at risk of future harm. *Herrington*, 2010 WL 3448531,  
 19 at \*4; *see also Boysen*, 2012 U.S. Dist. LEXIS 100528, at \*23-24 (no economic harm from  
 20 purchase of juice containing lead and arsenic where plaintiff had fully consumed juice and  
 21 experienced no physical injury); *Myers-Armstrong v. Actavis Totowa*, No. C 08–04741 WHA,  
 22 2009 WL 1082026, at \*5 (N.D. Cal. Apr. 22, 2009) (“[A]fter consuming the pills and obtaining  
 23 their beneficial effect with no downside, the consumer cannot get a refund on the theory that [he  
 24 would not have purchased the pills had he known they] came from a source of uncertain quality.  
 25 . . . [T]he civil law should not be expanded to regulate every hypothetical ill in the absence of  
 26 some real injury to the civil plaintiff.”); *Hicks v. Kaufman & Broad Home Corp.*, 89 Cal. App. 4th  
 27 908, 923 (2001) (“Cars and tires have a limited useful life. At the end of their lives they, and  
 28 whatever defect they may have contained, wind up on a scrap heap. If the defect has not

1 manifested itself in that time span, the buyer has received what he bargained for.”). *See also*  
 2 *Rivera*, 283 F.3d at 319 (“[Defendants] sold [a product]; [Plaintiff] purchased and used [the  
 3 product]; [Defendants] did not list enough warnings on [the product], and/or [the product] was  
 4 defective; other patients were injured by [the product]; [Plaintiff] would like her money  
 5 back.”); *Crouch v. Johnson & Johnson Consumer Cos.*, No. 09-cv-2905 (DMC), 2010 WL  
 6 1530152, at \*5 (D.N.J. Apr. 15, 2010) (rejecting “no injury” economic claims for failure to warn  
 7 of alleged carcinogens in Johnson’s Baby Shampoo).

8 The Ninth Circuit reached a similar conclusion in a case involving allegedly defective  
 9 headphones. In *Birdsong v. Apple, Inc.*, 590 F.3d 955 (9th Cir. 2009), the plaintiffs argued they  
 10 had suffered an economic injury because (according to the plaintiffs) Apple’s earbuds could cause  
 11 physical injury (hearing loss) if used at high volume for extended periods of time. But since the  
 12 *Birdsong* plaintiffs had not actually suffered any hearing loss, the Court rejected their claims. *Id.*  
 13 at 959-61 & n.4. As the Ninth Circuit explained, “[t]he risk of injury the plaintiffs allege is not  
 14 concrete and particularized *as to themselves*.” *Id.* at 960.

15 Estrada seeks compensation because she bought a product that, although it worked as  
 16 expected, also allegedly exposed her to a risk—but she never actually suffered any injury from  
 17 that risk. Just like the plaintiffs in *Herrington*, *Boysen*, *Myers-Armstrong*, and *Birdsong*, Estrada  
 18 has received the “benefit of [her] bargain” and has no valid claim of injury—economic or  
 19 otherwise. *Herrington*, 2010 WL 3448531, at \*1; *Boysen*, 2012 U.S. Dist. LEXIS 100528, at  
 20 \*23-24; *Myers-Armstrong*, 2009 WL 1082026, at \*5; *Birdsong*, 590 F.3d at 961. She thus lacks  
 21 standing and her entire Complaint should be dismissed with prejudice.

## 22 **V. PLAINTIFF’S CLASS DEFINITION SHOULD BE STRICKEN**

23 The Court should strike Estrada’s class definition because many—and in all likelihood,  
 24 most—members of Estrada’s proposed class were never even *exposed* to the risks Estrada alleges.  
 25 Courts may strike class allegations at the pleading stage “[w]here the complaint demonstrates that  
 26 a class action cannot be maintained on the facts alleged.” *Sanders*, 672 F. Supp. 2d at 990-91  
 27 (“No class may be certified that contains members lacking Article III standing. . . . The class must  
 28 therefore be defined in such a way that anyone within it would have standing.”). Indeed, many

1 courts have “refused to include in the class those purchasers who have suffered no injury, simply  
 2 because they allege they have purchased a product which ‘tends to’ cause injury.” *Bishop v. Saab*  
 3 *Auto. A.B.*, No. 95-cv-0721 JGD (JRX), 1996 WL 33150020, at \*5 (C.D. Cal. Feb. 16, 1996); *see*  
 4 *also Am. Suzuki Motor Corp. v. Superior Court*, 37 Cal. App. 4th 1291, 1299 (1995) (it was error  
 5 to include in the class those who experienced no injury; “[t]o hold otherwise would, in effect,  
 6 contemplate indemnity for a potential injury that never, in fact, materialized.”); *Lyons v. Bank of*  
 7 *Am., NA*, No. C 11–1232 CW, 2011 WL 6303390, at \*7 (N.D. Cal. Dec. 16, 2011) (striking class  
 8 allegations that “include[ ] many members who have not been injured”); *Tietsworth v. Sears,*  
 9 *Roebuck & Co.*, 720 F. Supp. 2d 1123, 1146-47 (N.D. Cal. 2010) (same).

10 Here, Estrada seeks to represent a class of “[a]ll persons who purchased Johnson’s Baby  
 11 Powder in California and in states with laws that do not conflict with the laws asserted here.”  
 12 (Compl. ¶ 74.)<sup>6</sup> But the risk that Estrada claims exists is relatively specific—it only applies to  
 13 adult women who use the product in a particular way and for an extended period of time. (*Id.* ¶ 3  
 14 (“Women who used talc-based powders to powder their genital area have a 33% increased risk of  
 15 ovarian cancer[.]”).) Estrada’s proposed class definition necessarily includes consumers who  
 16 were never even exposed to that alleged risk and thus have no possible claim: men, and women  
 17 who purchased Johnson’s Baby Powder for any use other than directly on their genitals.<sup>7</sup> Indeed,  
 18 even if Estrada’s economic loss claims were proper here (they are not) the only purchasers who  
 19 could conceivably assert those claims would be women who bought the product exclusively for  
 20 use in their genital area and could not put the product to any other beneficial use. The current  
 21 class definition is thus extraordinarily overbroad and should be stricken. *Tietsworth*, 720 F. Supp.  
 22 2d at 1146-47.

23  
 24  
 25  
 26 <sup>6</sup> Estrada’s class definition is also improperly expansive because it includes members who  
 27 purchased Johnson’s Baby Powder outside of the three-year statute of limitations period provided  
 28 by the CLRA or the four-year statute of limitations provided by the UCL. *See* Cal. Civ. Code  
 § 1783; Cal. Bus. & Prof. Code § 17208.

<sup>7</sup> *See* fn. 4, *supra*.

1        These problems with Plaintiff's class definition cannot be solved by amendment. Even if  
 2        Plaintiff were to limit her class,<sup>8</sup> there is no administratively feasible way to ascertain which  
 3        consumers might actually qualify as class members. Proof of purchase would not establish  
 4        membership because the product has many uses that have nothing to do with the alleged risk.  
 5        Instead, the Court would need to determine, on a consumer-by-consumer basis: (1) that the  
 6        consumer purchased Johnson's Baby Powder (rather than a similar J&J product (such as  
 7        Johnson's Baby Pure Cornstarch Powder) or other brand of talcum powder); (2) when the product  
 8        was purchased; (3) the price paid; and (4) the quantity purchased; as well as, for each purchase,  
 9        (5) that the product was purchased by an adult female or on behalf of an adult female; (6) who  
 10       used the product on her genitals; (7) and did not put the product to any other use. Johnson's Baby  
 11       Powder is purchased over the counter for a few dollars at retail locations throughout the  
 12       country—J&J obviously has no record of all purchasers, much less a record that could identify  
 13       the purchasers' sex and reasons for purchase. As many courts have held, class treatment is not  
 14       appropriate where the class depends, as would be the case here, on "the vagaries of memory" to  
 15       prove class membership.<sup>9</sup>

#### 16       **VI. PLAINTIFF'S FRAUD CLAIMS SHOULD BE DISMISSED UNDER RULE 9(b)**

17       Next, Estrada's fraud-based claims should be dismissed because she has failed to explain  
 18       what, exactly, she actually relied on when she purchased Johnson's Baby Powder. Estrada must  
 19       plead and prove actual reliance to succeed on her CLRA, UCL, and negligent misrepresentation

20       <sup>8</sup> *E.g.*, so that the class encompass only those women who purchased Johnson's Baby Powder  
 21       exclusively for use in their genital area.

22       <sup>9</sup> *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 214 F.R.D. 614, 617-18 (W.D. Wash.  
 23       2003). *See also, e.g., Red v. Kraft Foods, Inc.*, CV 10-1028-GW(AGRx), 2012 U.S. Dist. LEXIS  
 24       186948, at \*14-16 (C.D. Cal. Apr. 12, 2012) (declining to certify a class that "rel[ies] on [a  
 25       customer's] own memory of purchasing a small, everyday item"); *Xavier v. Philip Morris USA*  
 26       *Inc.*, 787 F. Supp. 2d 1075, 1089-90 (N.D. Cal. 2011) (rejecting class of "20 pack-years smokers"  
 27       because attesting to the number of cigarettes smoked over decades is categorically different from  
 28       swearing that "I have been to Paris"); *Hodes v. Van's Int'l Foods*, No. CV 09-01530 RGK  
 (FFMx), 2009 U.S. Dist. LEXIS 72193, at \*11 (C.D. Cal. July 23, 2009) (denying class  
 certification when plaintiffs were unlikely to be able to prove the product they "purchased, in  
 what quantity, and for what purpose"); *In re Hulu Privacy Litig.*, No. 11-CV-3764, [Dkt. No.  
 211] (N.D. Cal. June 17, 2014) (rejecting certification where class membership depended on  
 whether consumers: "log[ged] into Facebook and Hulu from the same browser; [typically]  
 log[ged] out of Facebook; . . . set browser settings to clear cookies; [or] use[d] software to block  
 cookies").

claims. See Cal. Civ. Code § 1780; Cal. Bus. & Prof. Code § 17204; *Princess Cruise Lines, Ltd. v. Superior Court*, 179 Cal. App. 4th 36, 46 (2009) (CLRA); *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 326 (2011) (UCL). And because Estrada’s claims are based in fraud, under Rule 9(b), “[i]n alleging fraud or mistake, [Estrada] must state with particularity the circumstances constituting fraud or mistake.” Fed. R. Civ. P. 9(b); see also *Neilson*, 290 F. Supp. 2d at 1141 (“It is well-established in the Ninth Circuit that both claims for fraud and negligent misrepresentation must meet Rule 9(b)’s particularity requirements.”). Thus, Estrada must plead the time, place, and specific content of the alleged fraudulent representation or omission<sup>10</sup>—“the who, what, when, where, and how”—as well as facts demonstrating her reliance on the alleged “fraud.” *Vess*, 317 F.3d at 1106 (citation omitted); see also *Kearns*, 567 F.3d at 1124.

Here, Estrada alleges only that “[p]rior to making her purchase, [she] read the label for the Baby Powder” and “reli[ed] on the label described herein and above.” (Compl. ¶ 9.) Yet Estrada does not claim that any statements on the label are actually false—if those statements are at issue in this lawsuit she must identify them and make clear which of them (if any) she actually relied on. If Estrada’s claims are based entirely on an alleged omission, then Estrada should make that clear and explain what, exactly, she contends should have been included on the label. But that does not appear to be the case: Estrada spends a fair portion of her Complaint alleging that Johnson’s Baby Powder is “advertised for use by women” (although she never identifies any such advertisements) and repeatedly refers to “historical” advertising and labels that, according to Estrada, “encouraged women to dust themselves with the Baby Powder daily to mask odors,” and “encouraged” the female genital use of the product. (*Id.* ¶¶ 13, 14, 15-17, 70-71.) But Estrada never identifies those “encouraging” statements, she never explains *which* specific statements (if any) that she personally either saw or heard, *when* or *where* she saw or heard them, or *which* (if any) statements induced her to purchase the product. See *In re Actimmune Mktg. Litig.*, 614 F. Supp. 2d 1037, 1051-52 (N.D. Cal. 2009); accord *Baltazar v. Apple, Inc.*, No. CV-10-3231-JF,

<sup>10</sup> As explained in Section VII.A., *infra*, Estrada cannot bring a negligent misrepresentation claim for an omission or for statements that are merely misleading. Rather, she must point to an affirmatively false statement.

2011 WL 588209, at \*2 (N.D. Cal. Feb. 10, 2011) (“Plaintiffs must identify the particular commercial or advertisement upon which they relied and must describe with the requisite specificity the content of that particular commercial or advertisement.”); *Cohen v. DirecTV, Inc.*, 178 Cal. App. 4th 966, 978-79 (2010) (plaintiff must allege that he was exposed to a specific deceptive representation); *see also Kearns*, 567 F.3d at 1126 (applying Rule 9(b) to dismiss UCL claims where plaintiff failed to specify “what the television advertisements or other sales material specifically stated . . . when [plaintiff] was exposed to them or which ones he found material . . . [and] which sales material he relied upon in making his decision to buy”).

Since Estrada’s allegations fall far short of pleading reliance with the specificity required by Rule 9(b), her fraud-based UCL,<sup>11</sup> CLRA, and negligent misrepresentation claims should be dismissed. *See Maxwell v. Unilever U.S., Inc.*, No. 12-CV-1736, 2013 WL 1435232, at \*4 (N.D. Cal. Apr. 9, 2013) (complaint did not “provide an unambiguous account of the ‘time, place, and specific content of the false representations.’”); *Vess*, 317 F.3d at 1106 (“The plaintiff must set forth what is false or misleading about a statement, and why it is false.”); *Kwikset*, 51 Cal. 4th at 326; *Sevidal v. Target Corp.*, 189 Cal. App. 4th 905, 928-29 (2010).<sup>12</sup>

<sup>11</sup> Estrada’s allegations under the “unlawful” prong of the UCL are also defective because she has not pled (and cannot plead) that J&J’s conduct was “unlawful.” Because Estrada cannot identify a single law that J&J has supposedly violated, her claims under the “unlawful” prong fail. *Daugherty v. Am. Honda Motor Co.*, 144 Cal. App. 4th 824, 837 (2006) (because the court rejected Daugherty’s claims under the CLRA, he “cannot state a violation of the UCL under the ‘unlawful’ prong predicated on a violation of either statute, as there were no violations”); *Hoey v. Sony Elec., Inc.*, 515 F. Supp. 2d 1099, 1105 (N.D. Cal. 2007) (UCL claims predicated on other claims that were not adequately pled must be dismissed).

<sup>12</sup> In addition, her claims should be dismissed to the extent that Estrada is attempting to base them on statements that she never actually saw—and the applicable statements should be stricken from the Complaint. *Lanovaz v. Twinings N. Am., Inc.*, No. C-12-02646-RMW, 2013 WL 675929, at \*1-2 (N.D. Cal. Feb. 25, 2013) (striking as “immaterial” claims based on labels plaintiff did not read and rely on); *Johns*, 2010 WL 476688, at \*5 (holding that plaintiff “cannot expand the scope of his claims to include . . . advertisements relating to a product that he did not rely upon”); *McCrary*, 2013 WL 6403073, at \*7-8 (dismissing claims referring to representations on defendant’s website for lack of standing, where plaintiff admitted he only relied on product packaging).

**VII. PLAINTIFF’S NEGLIGENT MISREPRESENTATION AND IMPLIED WARRANTY CLAIMS FAIL AS A MATTER OF LAW**

**A. Negligent Misrepresentation Requires a “Positive Assertion”**

Under California law, to state a claim for negligent misrepresentation, Estrada must point to a “positive assertion” that she saw and relied upon—“omissions” are insufficient as a matter of law. *Lopez*, 201 Cal. App. 4th at 596 (“carefully worded” report that may have been misleading, but was not actually false, could not support a negligent misrepresentation claim); *Shamsian v. Atl. Richfield Co.*, 107 Cal. App. 4th 967, 983-84 (2003); *Lopez*, 201 Cal. App. 4th at 596; *Apollo Capital Fund LLC v. Roth Capital Partners, LLC*, 158 Cal. App. 4th 226, 243 (2007). But here, Estrada claims only to have seen and relied on the product’s label and does not claim any of the statements on the product label are actually false. (See Compl. ¶¶ 9, 15.) Instead, her claims appear to be based on an “omission”—namely, that J&J should have affirmatively disclosed some type of information about the “risk” Estrada alleges. Her negligent misrepresentation claim therefore fails as a matter of law. *Apollo Capital*, 158 Cal. App. 4th at 243.

**B. Breach of Implied Warranty**

**1. Johnson’s Baby Powder Is Not “Unmerchantable”**

To assert claims for breach of the implied warranty of merchantability, Estrada must allege facts showing that Johnson’s Baby Powder failed to “possess even the most basic degree of fitness for ordinary use” such that it was “unmerchantable” when it was sold. *Mocek*, 114 Cal. App. 4th at 406. Yet Estrada admits that the “intended use” of Johnson’s Baby Powder is “to be used as a daily use powder intended to eliminate friction on the skin and to absorb unwanted excess moisture . . . .” (Compl. ¶ 110.) While Estrada may have chosen to use the product in a particular way that she contends is unsafe, she *does not* claim that Johnson’s Baby Powder failed to perform as promised or that the product has no beneficial use—as is set out above (*see* fn. 4, *supra*), consumers use Johnson’s Baby Powder and other talc-based products in a multitude of ways that have nothing to do with the allegedly risky behavior identified in Estrada’s Complaint.

As multiple courts have held, the fact that a risk could be associated with a particular use of a product does not make that product unmerchantable. *Birdsong*, 590 F.3d at 958-59; *Am.*

1 *Suzuki*, 37 Cal. App. 4th at 1297-98 (rejecting plaintiffs’ argument that “the test of  
 2 merchantability is . . . whether [the product] is free of all speculative risks, safety-related or  
 3 otherwise” and holding that a product is not unmerchantable where “a small percentage” had  
 4 safety issues but “the vast majority . . . did what they were supposed to do for as long as they  
 5 were supposed to do it.”) (internal quotation marks and citation omitted); *see also Rule v. Fort*  
 6 *Dodge Animal Health, Inc.*, 607 F.3d 250, 252 (1st Cir. 2010) (“Recovery generally is not  
 7 available under the warranty of merchantability where the defect that made the product unfit  
 8 caused no injury to the claimant . . .”). Here, Estrada does not claim that she did not get full  
 9 ordinary use from the product, or that she is “substantially certain to suffer inevitable” physical  
 10 injury from the product. *Birdsong*, 590 F.3d at 959. Since Estrada has failed to allege that  
 11 Johnson’s Baby Powder “lacks any minimum level of quality,” her implied warranty claim should  
 12 be dismissed. *See id.* at 958.

## 13 2. Plaintiff Lacks Privity

14 Estrada’s implied warranty claim should also be dismissed because Estrada does not claim  
 15 to have purchased Johnson’s Baby Powder directly from J&J. As the Ninth Circuit recognized in  
 16 *Clemens v. DaimlerChrysler Corp.*, under California law a “plaintiff asserting breach of warranty  
 17 claims must stand in vertical contractual privity with the defendant . . .” 534 F.3d at 1023. And  
 18 while some “federal district court judges erroneously have inferred a third-party [beneficiary]  
 19 exception to California’s privity rule . . . [n]o reported California decision has held that the  
 20 purchaser of a consumer product may dodge the privity rule by asserting that he or she is a third-  
 21 party beneficiary of the distribution agreements linking the manufacturer to the retailer who  
 22 ultimately made the sale.” *Xavier v. Philip Morris USA Inc.*, 787 F. Supp. 2d 1075, 1083-84  
 23 (N.D. Cal. 2011); *see also, e.g., Soares v. Lorono*, No. 12-cv-05979-WHO, 2014 U.S. Dist.  
 24 LEXIS 24674, at \*14 (N.D. Cal. Feb. 25, 2014) (dismissing implied warranty claim for lack of  
 25 privity); *Long v. Graco Children’s Prods. Inc.*, No. 13-cv-01257-WHO, 2013 WL 4655763, at  
 26 \*12 (N.D. Cal. Aug. 26, 2013) (following *Clemens* and declining to recognize a third-party  
 27 beneficiary exception to privity rule under California law).

1 **VIII. PLAINTIFF LACKS STANDING TO SEEK INJUNCTIVE RELIEF**

2 Finally, Estrada's request for injunctive relief—including her demand that this Court  
 3 “enjoin[ ] Defendant[s] from continuing the unlawful practices as set forth herein”—fails because  
 4 she has not alleged (and could not credibly allege) that she is personally threatened by any  
 5 repetition of the injury she claims to have suffered. To seek injunctive relief in federal court,  
 6 Estrada must demonstrate that she is “realistically threatened by a repetition of [the violation].”  
 7 *Gest v. Bradbury*, 443 F.3d 1177, 1181 (9th Cir. 2006) (citations and emphasis omitted).

8 But here, Estrada is already personally aware of the alleged increased risk of ovarian  
 9 cancer through personal genital use. She thus cannot possibly be deceived by any alleged  
 10 misstatements or omissions about the risk in the future. Because she cannot be personally  
 11 threatened by the conduct she seeks to enjoin, she lacks standing to pursue claims for injunctive  
 12 relief. *See, e.g., Walsh v. Nev. Dep't of Human Res.*, 471 F.3d 1033, 1037 (9th Cir. 2006)  
 13 (plaintiff was no longer an employee and there was “no indication . . . that [plaintiff] has any  
 14 interest in returning to work,” so she “would not stand to benefit from an injunction requiring the  
 15 anti-discriminatory policies she requests at her former place of work”); *Campion v. Old Republic*  
 16 *Home Prot. Co.*, 861 F. Supp. 2d 1139, 1149 (S.D. Cal. 2012) (plaintiff who did not intend to  
 17 purchase another warranty plan lacked standing because “Article III imposes a jurisdictional  
 18 requirement that is more stringent than the UCL, and which, with respect to Plaintiff's claim for  
 19 injunctive relief, is not satisfied.”); *Stephenson v. Neutrogena Corp.*, No. C 12-0426-PJH, 2012  
 20 WL 8527784, at \*1 (N.D. Cal. July 27, 2012) (striking prayer for injunctive relief where plaintiff  
 21 did not allege that she would purchase products in the future). Consequently, Estrada's claims for  
 22 injunctive relief should be stricken and/or dismissed.<sup>13</sup>

23  
 24 <sup>13</sup> Estrada's failure to allege facts sufficient to support her individual claim for injunctive relief  
 25 likewise dooms her prayer for injunctive relief on behalf of the class. *Deitz v. Comcast Corp.*,  
 26 No. 06-cv-06532 WHA, 2006 WL 3782902, at \*4 (N.D. Cal. Dec. 21, 2006) (class averments did  
 27 not cure the defect in plaintiff's complaint because “[u]nless the named plaintiff is himself  
 28 entitled to seek injunctive relief, he ‘may not represent a class seeking that relief.’”) (internal  
 citations omitted); *Wang v. OCZ Tech. Grp., Inc.*, 276 F.R.D. 618, 626 (N.D. Cal. 2011)  
 (“Allegations that a defendant's continuing conduct subjects unnamed class members to the  
 alleged harm is insufficient if the named plaintiffs are themselves unable to demonstrate a  
 likelihood of future injury.”).

1 **IX. CONCLUSION**

2 As discussed above, Estrada lacks Article III standing and her claims all fail as a matter of  
3 law. Accordingly, J&J requests that the Court dismiss the entire Complaint—or, in the  
4 alternative, strike Estrada’s request for injunctive relief, her overly broad proposed class  
5 definition, and her allegations related to statements that she never saw or relied on.

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